IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO. 540 OF 1988**

Shamsing Bahadursing Pardeshi & Anr. .. Appellants

vs.

Shri Magansing Bahadursingh Pardesh

& Ors. .. Respondents.

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Shri P.K. Dhakephalkar and Shri Amol Mhatre, Advocates for the Appellants.

Shri Shriram S. Kulkarni, Advocate for Respondnet no.2

**CORAM : ABHAY S. OKA, J.**

**DATE : 17TH AUGUST, 2004.**

**ORAL JUDGEMENT :**

1. On 4th July, 1989 this Court admitted the Second Appeal by observing that " the legal question involved

is whether survey no.43 of village Lohoner is the joint family property or the self acquired property of the Defendant no.2?"

2. The Second Appeal is preferred by the unsuccesful Original Plaintiff. The Respondents are the Defendants. For the purpose of understanding the factual controversy it will be necessary to refer to the genealogy of the parties which is as follows :

**Bahadursing (died on 17th September, 1963)**

**AND**

**Mishribai (widow of Bahadursingh-Plff.no.2./Appl. no.2)**

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| **Shamsing** | **Magansing** | **Govindsing** | **Leelabai** |
|---|---|---|---|
| **Plff no.1**<br>**Apll.no.1** | **Deft no.1**<br>**Resp.no.1** | **Deft.no.2**<br>**Resp.no.2** | **Deft.no.3**<br>**Resp.no.3** |

3. The Appellant no.1 and the Respondents no.1 and 2 are the real brothers. The Respondent no.3 is the real sister of the Appellant no.1 and Respondnet no.1 and 2. The Appellant no.2 herein is the mother of Appellant no.1 and the Respondent nos.1 to 3. The case of the Appellants is that Bahadursing the husband of Appellant no.2 and the father of Appellant no.1 and the

Respondents died on 17th September, 1963. the land bearing Gat no.32 and 43 alongwith Gram Panchayat house no.262 constituted joint family properties which are not partitioned. The case of the Appellants is that land bearing Gat no.43 is purchased by Respondent no.2 from the income of the joint family on 7th February, 1966. The Appellants claimed 12/25th share in the joint family property. The Appellants filed a suit for partition and separate possession.

4. The Respondents no.1 filed written statement and resisted the suit. The case of Respondent no.1 is that he was suffering from mental illness and the Respondent no.2 gave medical treatment to him by incurring heavy expenditure. It is his case that Respondent no.2 made expenditure for repayment of loan, for the marriage of Appellant no.1, for maintenance of the Appellant no.2 as well as for the maintenance of the joint family. A case is made out that Respondent no.2 had to do labour work because the income from the joint family property was not sufficient. It is contended that land bearing Gat no.43 is a self acquired property of the Respondent no.2.

5. The Respondent no.2 also filed his separate

written statement and raised the same contentions. He admitted that land bearing Gat no.32 and house property no.262 are the properties of the joint family. He, however, contended that land bearing Gat no.43 was his self acquired property which was acquired by him from his own income and that he has not purchased the same from the income of the joint family. He has made out a case that area of Gat no.32 is only 19.3 guntas and land was yielding Bajra crop of not more than two bags per year and therefore the income received was not sufficient to maintain the joint family. The Respondent no.2 contended that he had spent large amounts on medical treatment of Respondent no.1 and on the marriage of Appellant no.1.

6. The learned Trial Judge held that except the land bearing Gat no.43, the suit properties were the joint family properties. The learned Judge held that the Respondent no.2 purchased the land bearing Gat no.43 from his own earnings and hence it cannot be a joint family property which can be subjected to partition. In an Appeal preferred by the Appellants the learned Second Additional District Judge, Nasik held that the Appellants have no share in Gat no.43 which is exclusively owned by the Respondent no.2. The learned

Judge held that each Appellant and the Respondent nos.1 and 2 have 6/25 share in land bearing Gat no.32 and the house property. The learned Judge further held that the Respondent no.3 has 1/25 share. A cross objection was filed by Respondent no.2 which was dismissed by the learned Judge. The Appellants have taken exception to the Judgments and Decrees of the Courts below by preferring this Second Appeal.

7. The learned Counsel appearing for the Appellants Shri Dhakephalkar submitted that admittedly the agricultural land bearing Gat no.32 was the joint family property which was admittedly fetching some income. He submitted that the existence of nucleus from which property bearing Gat no.43 could have been purchased has been proved and therefore, the burden shifted on Respondent no.2 to establish that he has acquired land bearing Gat no.43 from his own income. The Learned Counsel further submitted that the Appellate Court has not considered the oral evidence on record. Without considering and without discussing the oral evidence in detail the Appellate Court has confirmed the Decree. He submitted that the Judgement of the Appellate Court is vitiated as the oral evidence on record is not considered and discussed. He submitted that the only

burden on the Appellants was to prove existence of nucleus. He submitted that once it was established by the appellants that the property forming part of the nucleus was fetching some income, the entire burden shifted on Respondent no.2 to prove that Gat no.43 was acquired by him from his own individual income. Relying upon the Judgment of Apex Court in the case of Mallesappa Bandeppa Desai v. Desai Mallappa reported in AIR 1961 S.C. page 1268, he submitted that it was for the Respondent no.2 to prove by clear and satisfactory evidence his plea that the purchase money for acquiring land bearing Gat no.43 proceeded from his own separate funds.

8. Shri Kulkarni, appearing for Respondent no.2 submitted that it is not enough for the Appellants to prove mere existence of nucleus. What was required to be proved was the existence of sufficient nucleus with the aid of which joint family property could have been acquired. He submitted that unless existence of nucleus which is sufficient to acquire the property bearing Gat no.43 was established, the burden did not shift on the Respondent no.2. He pointed out that the income from the joint family property i.e. Gat no.32 was too meagre to maintain the family and therefore the Respondent no.2

was required to work as an agricultural labourer. He submitted that a clear findings of facts are recorded by courts below which require no interference.

9. In reply to the said submissions, the learned Counsel appearing for the Appellants submitted that it is not pleaded by Respondent no.2 in his written statement that he was cultivating the land of Mahadu Bhika. In any event he submitted that the evidence of Mahadu Bhika shows that the Respondent no.2 cultivated his land only for two years. He submitted that the findings recorded by the Courts below are perverse.

10. I have considered the rival submissions. It is an admitted position that Gat no.32 is an agricultural land and is admittedly the property of joint family. It is also admitted that the said land is yielding some income which according to Respondent no.2 is very meagre.

11. Considering this admitted position, it will be necessary to refer to the findings recorded by the Trial Court. As the Appellate Court has not considered in detail, the oral evidence, the counsel appearing for the parties have take me through the notes of evidence. The learned Judge in paragraph no.8 has referred to the

evidence of the Respondent no.2 in which the Respondent no.2 has given details of various steps taken by him for the benefit of his family members including Appellant no.1. It is pointed out that the Appellant no.1 was only fifteen years of age at the time of demise of his father BahadurSing. He has given details of the income received by him by undertaking cultivation of the land of Mahadu Bhika. According to him he got sum of Rs.800/- to Rs.900/- from cultivation of the land of Mahadu Bhika for two years and from this amount he purchased Gat no.43 from Champabai. At this stage it is necessary to know that Champabai purchased the land bearing Gat no.43 from BahadurSing. In her deposition she has stated that Bahadur Sing was her maternal uncle. It is an admitted position that Champabai purchased land bearing Gat no.43 at the price of Rs.1,000/- from BahadurSing and she sold the said land to the Respondent no.2 for the price of Rs.500/-. Mahadu Bhika who was examined by Respondent no.2 stated that the Respondent no.2 cultivated his land for two years and Mahadu paid one half share in the income from his land to the Respondent no.2. He has stated that he paid to the Respondent no.2 a sum of Rs.500 to Rs.600/-. This figure is stated by him in the cross examination. In the Examination-in-chief he has stated that Respondent

no.2 received income of Rs.800/- to Rs.900/-. The Trial Court has referred to the evidence of Respondent no.2 in which he has stated that he had to repay the family loans. The Trial Court has also referred to the evidence of Respondent no.2 that Respondent no.1 was required to be admitted in mental hospital and Respondent no.2 was required to pay for his medical treatment. After considering the entire evidence, in paragraph no.11 of the Judgment, the learned Judge recorded the following finding, "Considering the number of members joint family and land Gat no.32, its income cannot be sufficient for the maintenance of joint family. Hence, an inference can easily be drawn and justified from circumstances which came on record, that Defendant no.2 must have purchased the land Gat no.43 by his own income, and not from the income of land Gat No.32, which is only 19.3 Gunthas. Hence, Defendant Nos.1 and 2 proved that Gat No.43 is self acquired property of Defendant no.2". The Trial Court further held that considering the number of members of joint family and income received from Gat no.32, the said income cannot be sufficient for maintaining the joint family. therefore inference was drawn by the learned Judge that the Respondent no.2 must have purchased the land from his own income. As stated earlier, the Trial

court has recorded that Respondent no.2 cultivated the land of Mahadu for two years and he got about Rs.800/- to Rs.900/- as income from the said land. There is no specific finding recorded that prior to purchase of land bearing Gat no.43 on 7th February, 1966, the Respondent No.2 received the said income from Mahadu. I am aware that the scope of an Appeal under Section 100 of the Code of Civil Procedure, 1908 is very limited. As no specific finding was recorded by the Trial Court in favour of Respondent no.2 that the income was received from Mahadu of Rs.800/- to Rs.900/- prior to 7th February, 1966 with a view to avoid injustice to Respondent no.2. I have perused the evidence of Mahadu. In examination chief he has stated that when Champabai was about to sell the land to Respondent no.2, the Respondentno.2 took money from him from the income of his land. In the cross examination, what has been stated is that Respondentno.2 culivated his land for two years and he paid one half share in the crops after deducting the expenses. As stated earlier, there is no clear finding recorded by the Trial Court that income which was received by the Respondent no.2 from cultivation of the land of Mahadu was prior to 7th February, 1966. Even if the evidence of Mahadu is read as it is, there is hardly anything in the said evidence

to prove that the income was received by the Respondent no.2 prior to 7th February, 1966. Apart from the income allegedly received by the Respondent no.2 from Mahadu, there is no specific finding recorded by the Trial Court as regards of any specific income from any other source. So far as the Appellate Court is concerned, again there is no specific finding as regards the period during which the Respondent no.2 cultivated the land of Mahadu. It is an admitted position as reflected from both the judgments of the Courts below that so far as the cultivation of land of Mahadu by Respondent no.2 is concerned, no entry to that effect is found in the 7-12 Extracts. The Appellate Court simply stated that Respondent no.2 was cultivating six acres of irrigated land of Mahadu and earning about Rs.800/- to Rs.900/- per year and from those savings he purchased Gat no.43. This finding is recorded without reference to the period during which Respondent no.2 cultivated the land of Mahadu. It is also to be stated here that it is not the case of Respondent no.2 that he made savings from the amount which he received from Mahadu.

12. Therefore taking into consideration the findings recorded by the Trial Court as it is, the legal position will have to be examined. Reliance was placed on the

paragraph nos. 17 and 18 Judgement of the Apex court reported in (2003) 10 S.C.C. page 310 (D.S. Lakshmaiah v/s L. Balasubramaniyam) which read thus:

> 17. In view of the aforesaid discussion, the Respondents having failed to discharge the initial burden of establishing that there was any nucleus in the form of any income whatsoever from Item 2 property and no other nucleus was claimed, the burden remained on the Respondents to establish that Item I property was joint family property. In this view, the fact that the first Appellant has not led any evidence to establish his separate income is of no consequence insofar as the claim of the Respondents is concerned. Under these circumstances, for failure to lead evidence, the Respondents claim of Item I to be joint family property would fail as rightly held by the first appellate Court.
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> 18. The legal principle, therefore is that there is no presumption of a property being joint family property only on account of

existence of a joint Hindu family. the one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired , there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available. "

13. In the case of Mallesappa Bandeppa Desai v. Desai Mallappa (supra) the Apex Court in paragraph no.15 held that "But in our opinion there is no doubt that where a manager claims that any immovable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase money proceeded from his separate fund. The onus of proof must in such a case be placed on the manager and not on his coparcerners".

14. It is also necessary to refer to the Judgment of the Apex Court reported in AIR 1969 SC page 1076 (Mudi Gawda v/s. Ramchandra Rawagowda Sankh) the said judgment is rendered by a bench constituting of three Hon'ble Judges of the Apex Court. Relying upon the said judgment in the context of the law laid down by the Apex Court, a contention was raised by the learned Counsel for the Respondent no.2 that it is not enough for the Appellants to prove the existence of joint family property forming nucleus. According to learned Counsel it must be established by the Appellants that the income received from the property forming part of the nucleus was sufficient from which the property in dispute could have been acquired. In the case of Mudi Gowda vs. Ram chandra Ravagowda Sankh (supra) the Apex Court held that the requirement of law is that the joint family property must be such as with its aid the property in question could have been acquired. If such fact is established the burden will shift on the person who claims that the property is self-acquried property. It must be noted here that Respondent no.2 is claiming to have acted as 'Karta' and manager of the joint family. In this context the law laid down by the Apex Court in the case of Mallesappa Desai is very relevant. The Apex Court held that where a manager claims that an immovable property

has been acquired by him with is own separate funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase money proceeded from his separate fund. The onus of proof must in such a case be placed on the manager and not on his coparceners. The Judgment of Apex Court in the case of D.S. Lakshmaiah & Ors. vs. L. Balasubramanyam & Ors (supra) cannot be read as authority for a proposition that a co-parcener who asserts that there was an existence of nucleus, burden is on him to prove that the quantum of income received from the nucleus was such that with the said income the property in dispute could have been acquired. What is required to be shown is the existence of nucleus with the aid of which the property could have been acquired as held by the larger bench of the Apex Court in the case of Mudi Gowda (supra). It is not the finding of the Court below that no income was being derived from the land bearing Gat no.32. The finding of the Courts below is that the income was not sufficient. As stated earlier there is no specific finding recorded by the Courts below that prior to the acquisition in 1966, the Respondent no.2 had such earning from which he could have paid Rs.500/- to Champabai for acquiring the land in question.

15. Therefore taking into consideration the findings of the Courts below as it is, it is clear that the existence of nucleus was established by the Appellants. When the burden shifted on Respondent no.2 it was for him to establish as held by the Apex Court in the case of Mallesappa by producing clear and satisfactory evidence that the entire purchase money proceeded from his separate funds. In my view, therefore, the courts below committed clear error of law by holding that the land bearing Gat no.43 was not the property of the joint family. Hence, the Appellants must succeed.

16. Hence, I pass the following order. The Second Appeal is allowed. the Decree passed by the Appellate Court is modified to the extent that alongwith land bearing Gat no.32 and the house property, land bearing Gat no.43 shall be also partitioned. There will be no orders as to costs.

. C.C. expedited.

sd/-

**JUDGE**